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SOUTHERN RAILWAY COMPANY *v.* TYREE'S ADMINISTRATOR.

Nov. 21, 1912.

[7 Va. App. 146.]

**1. Railroads—Signals in Yards.**—The reasons which justify a railroad company in dispensing with ordinary signals and lookouts in the work of shifting engines on railroad yards, and in placing upon the employee there a higher degree of care for his own safety from such engines, are without force when applied to the case of a regular train on a regular run over the main line. In the latter case there are no duties upon the engineer and fireman, except the usual duty of looking ahead and attending to the proper operation of the train, which has the same independence of position and action within yard limits that it has outside. The yard being a place of ceaseless activity, the engineer and fireman on such a train should be more on the alert to avoid injury because of the increased danger of harm occasioned by the environments.

**2. Evidence—Demurrer—Negligence.**—If the jury might find the defendant guilty of negligence and the deceased free from contributory negligence, the court must so find on a demurrer to the evidence.

**3. Damages—Elements—Wrongful Act.**—The elements of damage and the rules for their ascertainment by a jury in the case of wrongful act have been long and thoroughly established, and this court has no disposition to depart therefrom and adopt new elements of damage.

Error to Circuit Court of Amherst county. Affirmed.

*Coleman, Easley & Coleman*, for the plaintiff in error.

*Aubrey E. Strode, Volney E. Howard*, for the defendant in error.

**Note.**

See *Southern Railway Co. v. Darnell's Administratrix*, 18 Va. Law Reg. 690, and note.

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RAMSEY et als. *v.* DODD.

Richmond, November 21, 1912.

[7 Va. App. 149.]

**1. Equity—Jurisdiction—Wills—Probate by Clerk—Code, secs. 2544, 2639-a.**—A bill will not lie to an order of probate by the clerk of a court. The remedy in the first instance is by appeal to the court whose clerk made the order admitting the will to probate, as provided by section 2639-a of the Code.

Appeal from the Circuit Court of Nelson county. Modified and affirmed.

*P. R. Massie, S. V. Kemp*, for the appellants.

*W. K. Allen, C. L. Martin*, for the appellee.

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INTERSTATE FIRE INSURANCE COMPANY *v.* McFALL.

Richmond, November 21, 1912.

[7 Va. App. 150.]

**1. Equity—Jurisdiction—Contracts—Insurance.**—Where a contract for insurance of a building has been made with an agent of an insurance company, who is authorized to issue and deliver policies, and the amount of the premium agreed upon, to be paid upon issuance and delivery of the policy contracted for, but before the policy is issued the building is destroyed by fire, a court of equity has jurisdiction to enforce payment of the policy at the suit of the assured against the insurance company.

**2. Insurance—Agent—Authority.**—It is within the power of an agent, authorized to solicit risks and to issue and deliver policies of insurance, to give thirty days' time for the payment of a premium.

**3. Idem—Apportionment.**—Where it does not appear that the parties to a contract of insurance contemplated apportionment, and there was a total loss upon what was in substance a single risk, failure to make such apportionment does not invalidate the contract.

**4. Idem—Single Risk.**—Where it appears from the proof that the property insured constitutes a single structure, though it is spoken of as a "store building, warehouse and barn," it is in substance a single risk.

**5. Idem—Recovery—Premium.**—Where it appears that the premium on a policy of insurance contracted for was not paid and a recovery on the policy is allowed, credit should be given for the amount of the premium.

Appeal from Circuit Court of Wise county. Amended and affirmed.

*R. W. Withers, Irvine & Morison*, for the appellant.

*Vicars & Peery*, for the appellee.

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GROVE *v.* LEMLEY.

Richmond, November 21, 1912.

[7 Va. App. 155.]

**1. Limitations—At Law and in Equity—Mutual Mistake—Fraud.**—In cases of mutual mistake and fraud courts of law and courts of equity, in Virginia, apply different rules with respect to the defense